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Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte Communications
MB Docket No. 10-71
MB Docket No. 15-216

Dear Ms. Dortch:

On September 30, 2015, the undersigned and Mark Prak, a partner with Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, counsel to the NBC Television Affiliates (referred to herein as the “NBC Parties”), met with the following Commission staff to discuss the pending proposal to eliminate the network nonduplication rule (the “Rule”): Bill Lake, Chief, and Michelle Carey, Deputy Chief, Media Bureau; Mary Beth Murphy, Chief, Steve Broecker, Senior Deputy Division Chief, and Kathy Berthot, Attorney Advisor, Policy Division, Media Bureau; and Susan Aaron, Office of the General Counsel.

During the meeting, the NBC Parties explained that the broadcast network/affiliate distribution model has been incredibly successful for decades because it supports the delivery of both locally focused content and high-quality network programming to viewers of affiliated stations across the country, thus fulfilling Congress’s and the Commission’s goals of localism and diversity. The protection against duplication of network programming supported by the Rule is a core component of this distribution system because it preserves the full value of the network programming for each affiliate. That value is fundamental to the dual-revenue stream – comprised of advertising revenues and retransmission consent fees – that local broadcasters rely on to finance local program production and acquisition and to help offset network programming production and acquisition costs, including obtaining the broadcast rights for major sports and special events programming, such as NFL games and the Olympics, made available for free over-the-air broadcasting. Nonduplication protection within a station’s local

market allows the station to avoid the audience fragmentation that occurs when multiple network-affiliated stations with duplicative programming serve the same market.

The NBC Parties also addressed the arguments advanced by the Commission and certain parties that, following codification of retransmission consent in 1992, the Rule is not needed to offset the effects of the compulsory copyright licenses¹ and that the Rule is superfluous because local stations have private means of enforcing their nonduplication rights. In fact, the Rule serves as an essential counterweight to the compulsory copyright licensing regime and provides the most direct and efficient means of protecting those rights.

We explained that the Rule is an integral part of the complex web of compulsory copyright licenses, retransmission consent rules and program exclusivity rights that govern the distribution of broadcast programming by MVPDs. Indeed, when Congress codified retransmission consent in 1992, it pointed to the protections afforded to local stations by the exclusivity rules and cautioned that “[a]mendments or deletions of the [exclusivity rules]” would be “inconsistent with the regulatory structure” of the statute, including retransmission consent.² Further, Congress relied on the continued existence of network nonduplication in renewing the DBS distant signal license and required, *by statute*, that the Commission adopt similar protections in the satellite context.

With respect to the efficacy of private contractual remedies, we explained that the continued existence of the compulsory copyright license makes such remedies very complex, unwieldy, expensive and potentially protracted. Thus, in the absence of the compulsory license, if NBC as a copyright holder or licensor grants nonduplication protection to a station in a market, and a cable operator in that market imports a distant station affiliated with the same network, the local station either has a breach of contract claim against NBC *or* NBC has a copyright infringement claim against the cable system. It’s that simple – the cable operator either has permission from NBC to retransmit the network content via a distant station, which constitutes a breach of NBC’s agreement with the local station, or the cable operator lacks such permission, which constitutes an infringement of NBC’s copyright. Either way, the breach of the in-market station’s rights can be remedied without the need for any other contracts in place beyond the one that gives the station its bargained-for nonduplication protection.

With the compulsory license in place, however, the cable operator doesn’t need NBC’s permission as the copyright holder to retransmit in the territory – the government has given it that permission through the statutory license, and it simply needs retransmission consent from an out-of-market station, which is neither a breach of NBC’s exclusive license to the local

¹ See Official FCC Blog, “The Time Has Come to End Outdated Broadcasting Exclusivity Rules,” by Bill Lake, Media Bureau Chief, posted Sept. 22, 2015 (available at <https://www.fcc.gov/blog/time-has-come-end-outdated-broadcasting-exclusivity-rules>); Letter from Mary C. Lovejoy, American Cable Association (“ACA”), to William Lake in MB Docket No. 10-71 (filed Sept. 16, 2015).

² S. Rep. No. 102-92, at 38.

station nor an infringement.³ Therefore, to enable affiliates to enforce their nonduplication rights in court, all network affiliation agreements would have to prohibit affiliates and the networks' owned stations from granting retransmission consent outside of their markets, and each affiliate would have to be a third-party beneficiary under the other affiliates' agreements. Each affiliate would also need to obtain a contractual commitment from local MVPDs not to carry duplicating programming from a distant network station – a contract term that is now prohibited under STELAR with respect to “significantly viewed and other television signals.”⁴ Thus, the government, given the presence of the compulsory license, has made private enforcement of the contracted-for protection virtually impossible.

Moreover, the ability to enforce these rights – or even to create them by contract in the first instance – may be further constricted by calls to prohibit some of the very contractual provisions that support nonduplication protection. ACA, for example, has asked the Commission to “prohibit, as a *per se* good faith violation, any agreements – legally binding or otherwise – that have the effect of limiting the ability of a station to grant retransmission consent to an MVPD, whether through an outright prohibition, a grant of a veto/pre-approval power before the execution of an agreement, or any other means that has the purpose of influencing or disincentivizing the station's grant of retransmission consent out-of-market.”⁵

The Commission has now teed up for comment in its recently adopted “Totality of the Circumstances” *Further Notice of Proposed Rulemaking* in MB Docket No. 15-216 whether terms in agreements that impose certain limits on the grant of out-of-market retransmission consent are evidence of bad faith.⁶ It makes no sense to suggest that the Commission's limited role in enforcing nonduplication protection is no longer needed⁷ because the parties can craft private remedies and then, in a separate and ongoing proceeding, to ask whether those same private remedies should be prohibited.

This disjunction also underscores a fundamental *process* flaw with respect to any action taken *now* to eliminate the Rule. There are several ongoing proceedings that could have a direct impact on whether the Rule should be retained. In addition to the *Further Notice of Proposed Rulemaking* in MB Docket No. 15-216 discussed above, the GAO has just commenced a proceeding to consider whether the compulsory copyright licenses should be phased out. Because, as we explained, the Rule acts as a counterweight to the statutory licenses, the conclusions reached in that study will be relevant to the role played by the Rule in this complex

³ The NBC Parties also pointed out during the meeting that under the Section 111 compulsory copyright license, only owners of non-network programming may claim royalties, which further disadvantages the broadcast networks in this complex statutory and regulatory scheme. 17 U.S.C. § 111(d)(3).

⁴ See Order, Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, Sec. C & ¶ 5, MB Docket No. 15-37 (rel. Feb. 18, 2015).

⁵ Letter from Mary C. Lovejoy, ACA, to Marlene H. Dortch in MB Docket No. 10-71 (filed Sept. 11, 2015).

⁶ See *Implementation of Section 103 of the STELA Reauthorization Act of 2014 (Totality of the Circumstances Test)*, *Further Notice of Proposed Rulemaking*, MB Docket No. 15-216, ¶ 17 & n.93 (released Sept. 2, 2015).

⁷ We also noted that the Commission has not been overly burdened with requests over the years to enforce the Rule.

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statutory and regulatory ecosystem. Accordingly, the NBC Parties urged, first and foremost, that the Rule be retained and in any case that no action be taken on the Rule until these related proceedings have been completed.

This letter is being submitted electronically in the above-referenced dockets pursuant to Section 1.1206(b) of the Commission's rules. Questions with respect to this submission should be directed to the undersigned.

Respectfully submitted,

/s/ Margaret L. Tobey

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